Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-328

HENRY TRAFFICANTE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LAW OFFICES OF HENRY GONZALEZ

620 Madison Street
Tampa, Florida 33602

HENRY GONZALEZ
Attorney for Petitioner

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on May 19, 1975, affirming the judgment of the United States District Court for the Middle District of Florida upon a jury conviction of violations 18 U.S.C. Secs. 371 and 1955.

OPINION BELOW

The opinion of the United States Court of Appeals affirming the judgment of the District Court is reported at 552 F.2d 605 (5th Cir. 1977). As part of this Petition the reported case appears in the Appendix, pp A-1.

JURISDICTION

This Petition is brought under Rule 19 1. (b), Rules of the Supreme Court of the United States, and 28 U.S.C. 1254 (1), investing this Court with jurisdiction.

QUESTIONS PRESENTED

A. Whether 28 USC §753(b)(1) is mandatory and whether a trial court's refusal to provide the means of a complete transcript of trial proceedings deprives Petitioners of their "right" to Appellate review in a criminal case under the Federal Rules of Appellate Procedure.

B. Whether the District Court in denying the Motion for Severance on behalf of Petitioner, Trafficante, violated Petitioner's right to a fair and impartial trial.

STATUTES AND FEDERAL RULES INVOLVED

The provision of 28 USC §753(b)(1), Fifth Amendment of the Constitution of the United States and Rule 14 of Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE

A. The Petitioner, Henry Trafficante, adopts the Statement of the Case of the Petition for Writ of Certiorari filed by co-defendants, Alfredo Fernandez "Chino" "Al" Alfonso, Steve Guggino, Frank Fraterrigo Vega, Louis Henry "Dr.", "Bacardi" Figueredo, Sr., Sam Vaglica and Sam Castellano, Jr.

B. Your Petitioner filed pre-trial Motion for Severance and duly renewed said motions at different stages of the proceedings each time additionally bringing forth to the Court substantive grounds for the granting of the severance. The Trial Court denied Motion for Severance and was affirmed by the Fifth Circuit Court of Appeals in its opinion.

REASONS FOR GRANTING THE WRIT

A. The Petitioner, Henry Trafficante, adopts the Reasons For Granting the Writ of the Petition for Writ of Certiorari filed

by the co-defendants, Alfredo Fernandez "Chino" "Al" Alfonso, Steve Guggino, Frank Fraterrigo Vega, Louis Henry "Dr.", "Bacardi" Figueredo, Sr., Sam Vaglica and Sam Castellano, Jr.

B. The decision of the Court of Appeals erroneously fails to decide an important question of Federal law which has not been but should be settled by this Court, and said decision is in conflict with the decision of another Court of Appeals on the same matter.

The thrust of Petitioner's appeal centered upon the question whether the District Court properly denied severance to this Petitioner and further whether examination of this Petition far exceeded the guide lines and confines of the Federal Rules of Evidence.

It is Petitioner's contention that the Appellate Court has side stepped the fundamental issues presented in Petitioner's appeal in that it did not fully comprehend decided case law not only of the Fifth Circuit Court of Appeal but of the other courts which had direct relevancy and applicability to the severance issue.

Under the provisions of Rule 14 FRCP it is well established that granting of a severance is within the sole discretion of the Trial Judge. *Opper v. U.S.*, 348 U.S. 84 (1954) but it is Petitioner's strong urging herein that the Appellate Court in sustaining the decision of the Trial Court not to grant a severance has not followed the prevailing and controlling law of the Fifth Circuit and other courts which clearly mandate a severance in the case at Bar. *Byrd v. Wainwright*, 428 F.2d 1017 (5th Cir. 1970); *U.S. V. Echeles*, 352 F.2d 892 (7th Cir. 1965); *U.S. v. Burke*, 495 F.2d 1226 (5th Cir. 1974); *U.S. v. Cochran*, 499 F.2d 380 (5th Cir. 1974); and *U.S. v. Diez*, 515 F.2d 892 (5th Cir. 1975).

As an example of the Appellate Court not following the decision of that very court cites *U.S. v. Martinez*, 486 F.2d 415 (5th Cir. 1973), in which it says:

> "Under Rule 14 of the Federal Rules of Criminal Procedure, it is established that the granting of a motion for a severance is a matter within the discretion of the trial judge. Opper v. United States, 1954, 348 U.S. 84,75SCt. 158, 99 L.Ed. 101; Smith v. United States, 5 Cir. 1967, 385 F.2d 34, 37. When an appellant challenges the refusal of a trial judge to grant a motion to sever, he shoulders the burden of making a clear showing that 'prejudice resulting in the denial of a fair trial' flowed from the failure to grant the motion. United States v. Nakaladski, 5th Cir. 1973, 481 F.2d 289; United States v. Iacovetti, 5th Cir. 1972, 466 F.2d 1147, 1153, Smith v. United States, supra.
>
> The question then is whether depriving one defendant of the opportunity to use the exculpatory testimony of a co-defendant amounts to 'prejudice resulting in the denial of a fair trial.'

Byrd v. Wainwright, 5 Cir. 1970, 428 F.2d 1017, was a state habeas corpus case, governed by 14th Amendment Due Process considerations rather than by the corresponding relief from prejudicial joinder provisions of Rule 14, F.R.Crim.P. But the criteria are similar, and in Byrd this Circuit was presented with the opportunity to consolidate and catalogue prior rulings for the guidance of trial judges confronted with motions for severance based on a desire to offer exculpatory testimony of a co-defendant. Byrd sets forth the following guidelines: (i) the movant should 'show that the testimony would be exculpatory in effect'; we cautioned that such a showing would not require the equivalent of a statement under oath by the co-defendant whose testimony was sought, op.cit. at 1020; Smith v. United States, supra, at 38; (ii) the movant should show to the Court's satisfaction that the co-defendant will in fact testify; in this respect we cautioned that 'the inquiry is not as to the certainty whether the co-defendant will or will not testify but the likelihood'; op.cit. at 1022; Smith, supra, at 38. and (iii) we properly consider the exculpatory nature and the significance of the desired testimony to the

> movant's defense, which 'might be restated in terms of the extent of potential prejudice to the defendant if the defendant is tried without the opportunity to elicit the co-defendant's testimony', op.cit. at 1020; United States v. Echeles, 7 Cir. 1965, 352 F.2d 892, 897-898.

The Fifth Circuit in the case at bar by its opinion has alleged a new concept wherein it has now placed a trial court in the position of determining credibility of a witness-co-defendant. It has done so by evaluating the weight-credibility of the proffered evidence to be given by a co-defendant. This is an untenable position which no appellate court should authorize a trial Judge to consider in motions for severance. The Fifth Circuit Court of Appeals has by its opinion minimized the presumption of innocence that all defendants are clothed with prior to trial, during trial and only until such time as a jury decides contrary in accordance with the law as applied to the facts.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,
LAW OFFICES OF HENRY GONZALEZ

HENRY GONZALEZ
620 Madison Street
Tampa, Florida 33602
Attorney for Petitioner

PROOF OF SERVICE

I HEREBY CERTIFY that all parties required to be served herein have been served and further certify that three copies of the foregoing Petition for Writ of Certiorari have been served upon the United States Solicitor General, Department of Justice, Washington, D.C. 20530, and upon John L. Briggs, United States Attorney for the Middle District of Florida, United States Post Office Building, Tampa, Florida, this 17 day of August, 1977.

LAW OFFICES OF HENRY GONZALEZ

Henry Gonzalez

HENRY GONZALEZ

APPENDIX

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ALFREDO FERNANDEZ "CHINO" "AL" ALFONSO, STEVE GUGGINO, FRANK FRATERRIGO VEGA, LOUIS HENRY "DR.", "BACARDI" FIGUEREDO, SR., SAM VAGLICA and SAM CASTELLANO. JR., and HENRY "MR. GARCIA", "THE MAN" TRAFFICANTE,
Defendants-Appellants.

No. 75-3564

United States Court of Appeals,
Fifth Circuit

May 19, 1977

Defendants were convicted before the United States District Court for the Middle District of Florida, Gerald B. Tjoflat, J., of conspiracy and operating an illegal gambling business, and they appealed. The Court of Appeals, Jameson, District Judge, held that: (1) affidavit for wiretap order sufficiently established that traditional investigative techniques had been tried and failed; (2) those defendants who were not named in wiretap order received notice thereof in sufficient time to prepare a defense; (3) denial of motions for severance was not abuse of discretion; (4) the "five persons" criteria of the substantive statute is a jurisdictional requirement unrelated to the criminal character of conduct; (5) evidence reread to the jury in connection with its request to replay taped conversations to the defendant did not unfairly favor the Government and (6) gambling operations conducted by independent bookmaker were not independent of the larger sports-betting operation.

Affirmed.

1. telecommunications —496

Purpose of requirement that application for a wiretap include a statement as to whether traditional investigative procedures have been tried and failed or that they would not succeed if tried is not to foreclose electronic surveillance until every other imaginable method of investigation has been

unsuccessfully attempted but simply to inform the issing judge of the difficulties involved in the use of conventional techniques; furthermore, the statute contemplates that the showing be tested in a practical and commonsense fashion. 18 U.S.C.A. § 2518(8)(d).

2. Telecommunications —496

Application for wiretap authorization satisfied requirement of showing of unfruitfulness of alternative investigative procedures in view of its recitals that despite four months' investigation there were no witnesses who could be relied on to testify, that informants had refused to testify, that execution of search warrant would be unlikely to implicate the major controllers of the operation and that due to elandestine nature of the operation only wiretapping offered a reasonable likelihood of securing evidence necessary to apprehend the top figures. 18 U.S.C.A. § 2518(1)(c).

3. Telecommunications —496

Service of notice of entry of wiretap order on individuals who are not named in the application but are overheard is discretionary with the issuing judge. 18 U.S.C.A. § 2518(8)(d).

4. Searches and Seizures —7(10)

In the wiretap context, Fourth Amendment requirements are substantially satisfied where actual notice is provided to unnamed but overheard individuals in time for them to accurately prepare a defense. 18 U.S.C.A § 2518(8)(d); U.S.C.A.Const. Amend. 4.

5. Searches and Seizures —7(10)

Where indictment was returned February 1, 1972, defendants were arrested on March 2 and orally informed of wiretaps, on September 14 the defendants who were not named in the wiretap applications were sent written inventory notices, transcripts of all intercepted conversations were made available by January 4, 1973, and suppression hearing was not held until April of 1975, there was no Fourth Amendment violation since the unnamed defendant had received notice of the wiretaps in sufficient time to prepare a defense. U.S.C.A.Const. Amend. 4; 18 U.S.C.A. § 2518(8)(d).

6. Telecommunications —496

Requirement that the Government inform a judge issuing a wiretap order of the general class or classes of individuals whose conversations have been intercepted was satisfied where prosecutor testified that he informed the district court of every single person who had been identified during the course of the investigation and there was further testimony that background information on such individuals had been furnished to the court; such information was sufficient to permit the court to exercise an informed discretion in determining whether any legitimate privacy interest justified withholding inventory notice. 18 U.S.C.A. § 2518(8)(d).

7. Telecommunications —496

Government's request that inventory notice of wiretap authorization be limited to those individuals named in the wiretap order did not violate statutory requirements since the district court was in a position to exercise its informed discretion in deciding whether any legitimate privacy interest justified withholding inventory notice from certain parties to the intercepted conversations; similarly, failure to send formal inventory notice to individuals who were not named in the order did not constitute a statutory violation. 18 U.S.C.A. § 2518(8)(d).

8. Criminal Law —394.3

Even if Government's request for limited inventory notice of wiretap order or failure to send formal inventory notice violate statutory requirements, suppression of the wiretap evidence would not be required since postintercept notice was not intended to serve as an independent restraint on resort to the wiretap procedure. 18 U.S.C.A. § 2518(8)(d).

9. Constitutional Law —42.2)1)

Since defendants failed to bring their own conduct within alleged constitutional deficiencies of Florida antiwagering statute, the defendants, charged with operating an illegal gambling business, were precluded from attacking the statute on grounds of vagueness and overbreadth; defendants could not be heard to argue that some hypothetical persons might be improperly ensnared by the statute. 18 U.S.C.A. § 1955; West's F.S.A. § 849.14.

10. Gaming —63(2)

Although word "gambling" is not specifically defined in Florida antiwagering statute, the word is ued in its generic sense, 18 U.S.C.A. § 1955; West's F.S.A. § 849.14.

11. Criminal Law —622(2)

Denial of motion to sever, as made during course of prosecution for conspiracy and operation of an illegal gambling business, was not an abuse of discretion absent showing of likelihood of prejudice in the joint trial. Fed.Rules Crim.Proc. rule 14, 18 U.S.C.A.; 18 U.S.C.A. §§ 371, 1955.

12. Criminal Law —622(2)

Refusal to grant alleged supervisor of gambling operations a severance so as to permit alleged manager to give exculpatory testimony was not abuse of discretion, notwithstanding contention that the latter would not testify at a joint trial where there was no real question of the manager's guilt and he had nothing to lose by exculpating the supervisor and, perhaps, could be rewarded and evidence corroborating identification of supervisor's voice on intercepted conversations east doubt on credibility of proffered testimony that supervisor was not the individual to whom the manager was speaking in the intercepted conversations. 18 U.S.C.A. § 1955.

13. Witnesses —198(2)

Voice identification testimony of retired FBI agent, who during his government career was engaged in investigation of gambling operations but who following retirement was employed by defendant's attorney as a private investigator and who was called by the Government to identify defendant's voice on certain tape recordings, did not violate the attorney-client privilege, absent evidence that the witness had participated with defense counsel in investigation and preparation of the case or had received any confidential information from the attorney.

14. Criminal Law —444

Former government agent's statement that he had heard defendant's voice some ten times was sufficient foundation for his testimony identifying defendant's voice on certain tape recordings of intercept telephone communications; that other witnesses were available to provide identification was

immaterial, particularly since the witness was the agent most familiar with defendant's voice.

15. Witnesses —363(2)

Trial court did not abuse its discretion in treating former government agent as a hostile witness and permitting his impeachment based on his relationship with defendant's counsel, specifically, by showing that following retirement from government service he was employed by counsel as a private investigator, especially in view of his reluctance to testify and evasiveness in his testimony as to identity of defendant's voice on certain intercepted telephone communications. Federal Rules of Evidence, rule 607, 28 U.S.C.A.

16. Criminal Law —824(8)
Witnesses —380(5)

Testimony of three FBI agents with respect to retired agent's positive identification of defendant's voice some two days after expiration of wiretap order was admissible for impeachment purposes in view of his cross-examination testimony that he was not positive of the identification; although limiting instruction would have been proper had request therefor been made, failure to give such an instruction sua sponte was not reversible error.

17. Conspiracy —48.2(2)
Gaming —62

The "five persons" criteria of federal statute making it an offense to conduct a gambling business which is illegal under state law is a jurisdictional requirement unrelated to the criminal character of conduct; hence, trial court did not err in failing to instruct that the defendants must have been aware that the conspiracy involved at least five participants. 18 U.S.C.A. §§ 371, 1955.

18. Gaming —102

Failure to instruct that Florida gambling statutes did not apply to pari-mutuel wagering was not error, in prosecution for conducting illegal gambling business, absent evidence that gambling operation conducted the defendants constituted pari-mutuel wagering. 18 U.S.C.A. §§ 371, 1955; West's F.S.A. § 849.14.

19. Witnesses —216

Disclosure of identity of confidential informants whose information was used in securing wiretap order was not required absent evidence that the informants participated in the activities for which the defendant was charged or that evidence described by the informants was introduced at trial, much less evidence that the informants implicated defendant. 18 U.S.C.A. § 2510 et seq.

20. Criminal Law —470

In view of cryptic nature of intercepted conversations, which were often framed in jargon peculiar to the gambling trade, it was proper to present expert testimony as to meanings of the conversations and roles of the defendants; admission of such testimony, as given by individual who qualified as expert in bookmaking and gambling, was not improper as invading ultimate issues of fact. 18 U.S.C.A. §§ 371, 1955.

21. Indictment and Information —81(5)

Where aliases were extensively used in intercepted conversations and there was ample testimony to identify defendants with the various aliases, it was not error to deny motion to strike the aliases, as against contention that use thereof in the indictment invaded the jury's province of identification of the voices on tape recordings of intercepted conversations. 18 U.S.C.A. §§ 371, 1955.

22. Criminal Law —859

Trial judge has broad discretion in responding to a jury request that certain evidence he reread.

23. Criminal Law —1174(1)

Extreme length of the rereading proceedings, as occurred following jury's request to replay tape conversations of two defendants, did not indicate prejudice per se.

24. Criminal Law —859

Ordering testimony relating to matters discussed on tape recordings to be read in connection with replaying, at jury's request, of tape recordings of conversations between two defendants did not unfairly favor the Government where trial court stated it would allow the reading of a portion of the Government's case and then move to two defense witnesses

who dealt with identification but at later side bar conference defense counsel advised the court that he wished only a part of the examination of one witness read.

25. Criminal Law —711

Defense counsel was not entitled to make additional summations to the jury after certain evidence was reread at jury's request; trial court properly followed format for final argument specified in the criminal rules. Fed.Rules Crim.Proc. rule 29.1, 18 U.S.C.A.

26. Criminal Law —859

In having certain testimony reread, at jury's request, the trial court properly relied on notes of the official court reporter rather than on daily copy of testimony prepared by state court reporter.

27. Criminal Law —1166.13

Although statutory requirement that a court reporter attend each session of district court and record all proceedings in criminal cases had in open court is mandatory, failure to comply does not constitute prejudicial eror per se. 28 U.S.C.A. § 753(b)(1).

28. Criminal Law —1166.13

Failure to record all proceedings in connection with rereading of certain testimony, as requested by jury, was not reversible error per se; showing of prejudice was required. 28 U.S.C.A. § 753(b).

29. Gaming —98(1)

Government agent's testimony that based on intercepted conversations he calculated that daily receipts of the enterprise, on October 2, 9, and 10, were $15,569.00, $2,225.00 and $12,897.00 respectively, was sufficient to establish the statutory element of "gross revenue" for purpose of conviction of operating an illegal gambling business. 18 U.S.C.A. § 1955.

30. Gaming —79(1)

Gambling operation conducted by independent bookmaker, who was shown to have regularly accepted lay-off bets from sports-betting operation, had sufficient nexus with the latter so as to warrant the bookmaker's conviction as one of the

participants; prosecution under the federal statute was not precluded on ground that the bookmaker's gambling operation was separate from that of the sports-betting operation. 18 U.S.C.A. § 1955.

31. Gaming —79(1)

Congress' purpose in enacting statute making it an offense to operate an illegal gambling business was to include all persons who participate in the operation of such a business, including lay-off betters, and to exclude only customers. 18 U.S.C.A. § 1955.

Bennie Lazzara, Jr., Anthony F. Gonzalez, Tampa, Fla., for Alfonso.

Thomas J. Hanlon, III, Tampa, Fla. (Court appointed) for Guggino.

Virgil M. Wheeler, Jr., New Orleans, La., Henry Gonzalez, Tampa, Fla., for Trafficante.

Ralph W. Rinehart, Tampa, Fla. (Court appointed), for Vega.

Everett Q. Jones, Tampa, Fla. (Court appointed), for Figueredo.

John S. Matthews, Tampa, Fla., for Vaglica and Castellano.

John L. Briggs, U.S. Atty., Jacksonville, Fla., Robert J. Erickson, Vincent R. Alto, Sp. Atty., Mervyn Hamburg, Atty., Dept. of Justice, Washington, D.C., for plaintiff-appellee.

Appeals from the United States District Court for the Middle District of Florida.

Before BROWN, Chief Judge, AINSWORTH, Circuit Judge, and JAMESON*, District Judge.

* Senior District Judge of the District of Montana, sitting by designation.

JAMESON, District Judge:

The seven appellants were convicted, following a jury trial, of conspiracy (Count I) and the operation of an illegal gambling business (Count II), in violation of 18 U.S.C. §§ 371 and 1955.[1] Upon consideration of the numerous alleged errors urged by the appellants, we find no reversible error and affirm.

Facts

On September 30, 1971, Assistant United States Attorney Dempsey presented to Judge Joseph Lieb of the United States District Court for the Middle District of Florida an application for electronic surveillance of three telephones suspected to be involved in illegal gambling operations headquartered at 801 East Jean Street in Tampa, Florida. The application was based on information supplied by four confidential informants who were bettors or observers of the illegal gambling operation. Based on the information contained in the application and supporting affidavit, Judge Lieb authorized electronic interception of all gambling related conversations of "Steve Guggino, . . . Frank Vega, . . . and others as yet unknown" conducted over the three target telephones.

During the 15 day operative period of the order,[2] communications intercepted over the three telephones revealed

1. 18 U.S.C. § 1955 provides in pertinent part:

"(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

"(b) As used in this section—

(1) 'illegal gambling business' means a gambling business which—

"(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day."

2. The wiretap authority terminated on October 14, 1971, but was extended for fifteen days by order of the court on October 15. Evidence obtained under the extension of the wiretap and all subsequent wiretap orders was not used by the Government. The evidence was suppressed under the holding of *United States v. Giordano*, 416 U.S. 505, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974) since the extension and later orders were not approved by either the Attorney General or a designated assistant attorney general.

the existence of a sports betting operation dealing primarily with football and baseball wagering. The Government's case, based on the intercepted telephone conversations and other evidence presented at the trial, established that Trafficante occupied a supervisory position in the gambling operation and served as a source for "line" information (odds). Below Trafficante in the hierarchy, Guggino and Vega managed the gambling enterprise and operated the Jean Street clearing house as partners. While Guggino and Vega would on occasion accept wagers from individual bettors, they generally disseminated line information to, and accepted bets from, a network of "writers",[3] acted as intermediaries between Trafficante and the writers, and coordinated "lay-off" betting.[4] Vaglica, Castellano, and Alfonso were writers, accepting bets from individual bettors and channeling them to Guggino and Vega. Figueredo was an independent bookmaker who acted as a lay-off bettor for the Trafficante operation and exchanged line information with Guggino and Vega.

The Government presented its case primarily by playing tape recordings of the intercepted conversations, identifying the voices thereon, and then having an expert explain the significance of the conversation in the context of gambling. Some of the tapes, which contained conversations conducted in foreign languages, were translated into English by an interpreter. Transcripts were made of the translations which were read at trial following the playing of the tapes. Also produced as witnesses were individuals who had placed bets with several of the appellants.

At the conclusion of the eighteen day trial, the jury convicted all appellants on both counts. Appellants were sentenced to prison terms of varying duration.

3. A "writer" is an agent of a bookmaker who accepts bets from individuals and funnels them to the bookmaker.

4. "Lay-off" bets are bets between bookmakers made in an effort to reach a mutually favorable balance in each bookmaker's bets. Because a bookmaker charges a losing bettor a commission (usually ten percent), it is to his advantage to place an even amount of wagers on both sides of a contest so that regardless of who wins, the bookmaker receives a ten percent net profit. In order to achieve this equilibrium, bookmakers engage in lay-off betting with one another.

Issues on Appeal

The issues raised by the various appellants may be summarized as follows:

(1) Did the Government comply with the provisions of Title III of the Omnibus Crime Control and Streets Act of 1968, 18 U.S.C. § 2510, *et seq?*

(2) Is the Florida anti-wagering statute unconstitutionally vague?

(3) Were appellants entitled to separate trials?

(4) Was the admission of John Ambler's identification testimony of Trafficante's voice proper in all respects?

(5) Did the court properly instruct the jury in its main and supplemental charges?

(6) Were the court's various evidentiary and procedural rulings correct?

(7) Did the court err in having various portions of the record reread to the jury?

(8) Was the evidence sufficient to support the convictions?

Title III Compliance

Requirements of 18 U.S.C. § 2518(1)(c)

18 U.S.C. § 2518(1)(c) requires that an application for an order authorizing the interception of wire or oral communications must include "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous. . ."

Prior to trial, Trafficante moved to suppress evidence seized pursuant to the intercept application and order alleging, among other violations, that "[t]he application did not contain a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they were unlikely to succeed if tried". Trafficante contends that

denial of his motion was error, citing *United States v. kalustian*, 529 F.2d 585 (9 Cir. 1976). The Ninth Circuit there found an affidavit insufficient which recited an F.B.I. agent's conclusion that because of difficulties in securing evidence in previous gambling cases, interception of the telephone communications of a suspected gambling organization was the "only available method of investigation" likely to secure sufficient evidence to obtain a conviction. Because alternative investigative procedures had not been tried and because the Government had failed to show why investigative problems in the case were any different "in nature or degree from any other gambling case", the court held that the requirements of § 2518(1)(c) had not been fulfilled.

[1] In reviewing the sufficiency of the affidavit here, it must be noted that the purpose of section 2518(1)(c) "is not to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted, but simply to inform the issuing judge of the difficulties involved in the use of conventional techniques". *United States v. Pacheco*, 489 F.2d 554, 565 (5 Cir. 1974), *cert. denied*, 421 U.S. 909, 95 S.Ct. 1558, 43 L.Ed.2d 774 (1975). Furthermore, the statute contemplates that "the showing be tested in a practical and commonsense fashion". S.Rep. No. 1097, 90th Cong., 2d Sess., 1968 U.S.Code Cong. & Admin.News, pp. 2112, 2190.

[2] Viewed in light of these principles, we conclude that the affidavit filed by Special F.B.I. Agent Kinne in conjunction with the intercept application satisfied the requirements of § 2518(1)(c). Both the application and the affidavit stated that normal investigative techniques were unavailing. The affidavit disclosed an active investigation of the gambling operation spanning a period of four months, during which F.B.I. agents had conducted physical surveillance of the Jean Street clearing house. In spite of this investigation, there were no witnesses "who could be relied upon to testify", and the informants had refused to testify. Agent Kinne, who had "investigated matters relating to organized crime" for over four years and was familiar with gambling operations, further averred that execution of a search warrant was unlikely to implicate the "major controllers" of the gambling operation. Due to the "clandestine" nature of the operation, only wiretapping offered a "reasonable likelihood" of securing evidence necessary to

prove the gambling violations and to apprehend the top figures of the organization.[5] Viewed in a commonsense manner, these allegations were sufficient to establish that traditional investigative techniques had been tried and failed, and were not reasonably likely to succeed if tried.

The decision in *Kalustian* does not persuade us to reach a contrary conclusion. Unlike the affidavit in that case, the affidavit here established that conventional investigative techniques had been tried and were unsuccessful. The affidavit did not, as in *Kalustian*, rely on mere conclusions of the affiant based only on the affiant's "knowledge and experience" in investigating other gambling cases. Rather, this affidavit recited specific instances in the investigation of this case where normal techniques had been unfruitful. *Kalustian* is distinguishable.

Moreover, subsequent to *Kalustian*, the Ninth Circuit has considered the sufficiency of affidavits to support applications for wiretap interception in a number of cases,[6] most recently in *United States v. Spagnuolo*, decided March 4, 1977, 549 F.2d 705. In an exhaustive and well considered opinion citing decisions of the Ninth and other circuits subsequent to *Kalustian*, the court said in part:

> "These decisions permit us to make the following observations. To show that 'other investigative procedures

5. The affidavit stated, in pertinent part:

"The interception of these criminal conversations is necessary because:

"1. All of the confidential informants have refused to testify in open court and without their testimony, it would be impossible to obtain evidence of this illegal business.

"2. If a search warrant were executed, it could result in the seizure of gambling records; however, it would probably not tie in the major controllers of this gambling organization.

"3. There are no known witnesses who could be relied upon to testify to these violations.

"4. Due to the clandestine manner in which this betting operation is carried out, the interception of these communications is the only available means of investigation which has a reasonable likelihood of security the evidence necessary to prove the commission of these violations as well as providing evidence implicating the men who are the top controllers of this illegal gambling business."

6. Including *United States v. Kerrigan*, 514 F.2d 35 (9 Cir. 1975) *cert. denied*, 423 U.S. 924, 96 S.Ct. 266, 46 L.Ed.2d 249 (1975) and *United States v. Feldman*, 535 F.2d 1175 (9 Cir. 1976), where the Ninth Circuit upheld the validity of affidavits similar to the one here.

have tried and failed' the affidavit must reveal that normal investigative techniques have been employed in a good faith effort to determine the identity of those violating the law and to assemble sufficient evidence to justify their prosecution and that these efforts have failed to achieve their ends. The good faith effort need not have exhausted all possible uses of ordinary techniques. What is required is a showing that in the particular investigation normal investigative techniques employing a normal amount of resources have failed to make the case within a reasonable period of time."

The motion to suppress was properly denied.

Requirements of § 2518(8)(d)

18 U.S.C. § 2518(8)(d) requires that:

"(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted."

The wiretap here was authorized on September 30, 1971, for a period of 15 days and was extended for an additional 15 days on October 15. Judge Krentzman [7] on December 27, 1971, granted a 30 day extension of time for service of notice required by § 2518(8)(d) and granted a further 15 day extension on January 24, 1972.

7. Upon Judge Lieb's death on November 1, 1971, Judge Krentzman took over the case. Judge Krentzman supervised the bulk of the wiretap investigation.

During the operative period of the wiretap orders, Assistant United States Attorney Dempsey made written reports every five days to Judge Lieb and then to Judge Krentzman concerning information obtained on the wiretaps. Dempsey discussed in detail with the judges the individuals who were overheard and identified.[8] On February 4, 1972, Dempsey informed Judge Krentzman of the persons who were named in the indictment returned February 1, but requested the judge to limit inventory notice to those who were named in the wiretap order—Vega and Guggino. Due to problems within the Department of Justice regarding its wiretap authorization procedures, it was anticipated that arrests pursuant to the indictment would not be made for some time, which prompted the request for limited notice to minimize the potential for flight of those indicted. Judge Krentzman complied with the request, and on February 7, 1972, notice was served on Vega and Guggino.

Only Vega and Guggino were required by statute to receive inventory notice, since they were named in the wiretap order. Vega contends that he was not served with notice of the September 30 and October 15 wiretaps, but received notice only of a spin-off wiretap. At a suppression hearing, the deputy United States Marshal charged with serving the notice testified that on February 7, 1972, he served copies of four inventory notices on Vega, one of which concerned the September 30

8. Regarding his discussions with Judge Krentzman, Dempsey testified at the suppression hearing:

"We discussed every single person who was a subject—who had been identified during the course of this investigation, who had been identified as participating in the particular operation."

"He wanted to know the personality—the people involved, where they resided, what information we had as to their activities."

"I made it a point in my conversations with Judge Krentzman to bring to the attention of Judge Krentzman each of the individuals named in the—in Mr. Kinne's reports."

Dempsey also had detailed discussions with Judge Krentzman about other aspects of the operation:

"We discussed at great length, the law. I remember that. He [Judge Krentzman] took a great deal of time in reviewing my application, as well as the prior applications and the prior orders and the affidavits of the agents."

"We discussed the locations. We even discussed how the monitoring was being accomplished, where it was being accomplished, what cooperation the General Telephone Company was providing to us, what languages were being employed."

wiretap. A return copy of the notice of the September 30 wiretap was received in evidence, showing that it had been served on Vega on February 7. This factual issue was determined against Vega by the district court.

[3] The remaining appellants were not named in the September 30 order, but their conversations were overheard. Although service of notice on unnamed but overheard individuals is discretionary with the issuing judge, appellants moved to suppress the wiretap evidence, contending that they should have been served with notice. The motion to suppress was denied. On appeal, appellants contend that Fourth Amendment protections require that notice be given to unnamed but overheard persons "promptly after the decision to obtain an Indictment has been made", citing *United States v. Chun*, 503 F.2d 533 (9 Cir. 1974). Appellants further argue that the Government's request for limited service of notice created a violation of Title III. Finally, it is argued that although appellants received the inventory order during discovery, this was not a unilateral notice as required by § 2518(8)(d).

We begin our review of appellants' contentions with a consideration of the Fourth Amendment issue. The Ninth Circuit in *United States v. Chun, supra* at 537, relied on by appellants, stated:

> "[W]e point out that the unnamed but overheard are also entitled to Fourth Amendment protection. Specifically, we believe that when the government intends to use the contents of an interception or evidence derived therefrom, to obtain an indictment against an unnamed but overheard individual, such individual must be given notice promptly after the decision to obtain an indictment has been made." 503 F.2d at 537.[9]

9. On remand, the district court concluded as to the Fourth Amendment issue:

> ". . . I conclude that a conscious decision not to notice an unnamed but overheard individual who was known to be tapped for indictment could not withstand constitutional scrutiny. If, as held on appeal herein, the unnamed but overheard defendant has a Fourth Amendment right to privacy of the same dimensions as that of a named defendant, post-use notice of a wiretap is required, and a failure to give such notice would render the overheard communication unlawfully intercepted within the meaning of § 2518(10)(a)." *United States v. Chun*, 386 F.Supp. 91, 95-96 (D.Haw.1974).

But the court went on to note that "[i]n this context, the determination of what constitutes 'promptly' should focus on whether the individual has been afforded a reasonable opportunity to prepare an adequate response to the evidence which has been derived from the interception." 503 F.2d at 538.

The Eighth Circuit in *United States v. Wolk*, 466 F.2d 1143 (1972) held that suppression of wiretap evidence was not required on either constitutional or statutory grounds merely because inventory notice had not been served on unnamed and overheard individuals, where those individuals "had actual notice of the interceptions and were not prejudiced". The unnamed persons, although receiving no statutory inventory notice, were informed of the wiretap at arraignment and were thereafter allowed complete access to the tapes and transcripts. In reaching its conclusion, the court said:

> "To us the statute is concerned with adequate notice and not formalities. The record demonstrates that the appellees were sufficiently aware of the wiretap so as to be able to seek suppression of the evidence on a number of grounds . . . The appellees had adequate notice in this case, and they have not shown that any prejudice resulted from the failure of the Government to formally serve them with the inventories." 466 F.2d at 1146.

[4, 5] We agree with these circuits that in the wiretap context, Fourth Amendment requirements are substantially satisfied where actual notice is provided to unnamed but overheard individuals in time for them to adequately prepare a defense. We conclude that appellants received such notice here. The original indictment [10] was returned on February 1, 1972, and appellants were arrested on March 2, 1972, when they were orally informed of the wiretaps. On September 14, 1972, appellants were sent written inventory notices "comparable in content to those envisioned by § 2518(8)(d)", and no later than January 4, 1973, transcripts of all intercepted conversations were made available to appellants. The suppression hearing was not held until April, 1975 allowing appellants ample time to prepare their defense. In these circumstances, we find no Fourth Amendment violation.

10. This indictment was twice superceded. Appellants were tried on the second superceding indictment, which was returned on April 21, 1972.

[6] Aside from the constitutional issue is the question of Government violation of Title III statutory requirements. First, consideration must be given to whether the district court was afforded an opportunity to exercise an informed discretion. This question was recently addressed by the Supreme Court in *United States v. Donovan*, — U.S. —, 97 S.Ct. 658, 50 L.Ed.2d 652 (1977). The Court there noted that, "In deciding whether legitimate privacy interests justify withholding inventory notice from parties to intercepted conversations, a judge is likely to require information and assistance beyond that contained in the application papers and the recordings of intercepted conversations made available by law enforcement authorities." 97 S.Ct. at 669. The Court adopted the Ninth Circuit requirement that the Government must inform the district court of "the general class, or classes", of "[individuals] whose conversations have been intercepted", but also stated that where "the Government chooses to supply the issuing judge with a list of all identifiable persons rather than a description of the classes into which those persons fall, the list must be complete." 97 S.Ct. at 670. We conclude that the Government satisfied this requirement. Assistant United States Attorney Dempsey testified that he informed the district court of "every single person . . . who had been identified during the course of this investigation". There was further testimony that background information on these people was furnished to the court. This was sufficient for the court to exercise an informed discretion. We do not face the problem present in *Chun* and *Donovan* of the failure of the Government to inform the district court of the identity of persons whose conversations were intercepted.

[7, 8] The Government's request for limited notice did not violate any provision of Title III since the district court was in a position to exercise its informed discretion. Similarly, the failure of the Government to send formal inventory notice to appellants did not constitute a statutory violation. Notice to appellants, who were unnamed in the wiretap order, rested within the sound discretion of the court, which was properly exercised. In any case, appellants received actual notice. As the court in *Wolk*, *supra* at 1146, said, "We do not believe that the use of formal inventories is an end unto itself. Surely neither the Congress nor the constitution would require such emphasis of form over substance. . ." See also *United States v. Donovan*, *supra*, 97 S.Ct. at 674, fn. 26. We find no statutory violations of

Title III. Even were we to agree with appellants' argument, suppression of the wiretap evidence would not be required since "postintercept notice was [not] intended to serve as an independent restraint on resort to the wiretap procedure". *United States v. Donovan*, *supra* at 674.

Vaglica independently contends that he was not served with post-termination inventory notice, as ordered by the district court. However, the order did not relate to the interception here, but to a wiretap order approved on November 12, 1971. As noted *supra*, all evidence seized under the November 12 order was suppressed under *Giordano*.

Florida Anti-Wagering Statute

[9, 10] Pursuant to 18 U.S.C. § 1955, which defines an illegal gambling business as one which "is a violation of the law of a state . . . in which it is conducted", the indictment charged that the appellants' gambling was in violation of § 849.14, Florida Statutes Annotated (1965).[11] Vega, joined by the other appellants, argues that this statute is so "overbroad, vague and indefinite" that it "fails to apprise the public of the specific act or acts prohibited". Appellants do not attempt to bring their own activities within the scope of this argument, but rather argue that some hypothetical persons might be improperly ensnared by the statute.

In view of appellants' failure to bring their own conduct within the alleged constitutional deficiencies of the statute, they are precluded from attacking the statute on grounds of vagueness and overbreadth. As the Supreme Court stated in *United States v. Raines*, 362 U.S. 17, 21, 80 S.Ct. 519, 522, 4 L.Ed.2d 524 (1960): ". . . one to whom application of a statute is

11. Fla.Stat.Ann., § 849.14 Provides:
"Whoever stakes, bets or wagers any money or other thing of value upon the result of any trial or contest of skill, speed or power or endurance of man or beast, or whoever receives in any manner whatsoever any money or other thing of value staked, bet or wagered, or offered for the purpose of being staked, bet or wagered, by or for any other person upon any such result, or whoever knowingly becomes the custodian or depositary of any money or other thing of value so staked, bet, or wagered upon any such result, or whoever aids, or assists, or abets in any manner in any such acts all of which are hereby forbidden, shall be guilty of gambling, and shall be punished by imprisonment not exceeding six months or by fine not exceeding five hundred dollars."

constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional."

Moreover, we find no merit in appellants' contention. As this court noted in *United States v. Pacheco*, 489 F.2d 554, 564 (1974) *cert. denied*, 421 U.S. 909, 95 S.Ct. 1558, 43 L.Ed.2d 774 (1975), while gambling is not specifically defined in the statute, it is clear that "gambling" is used in its generic sense. We can perceive no possibility of including the hypothetical persons suggested by appellants as potential violators under any reasonable construction of the statute.

Motions for Severance

[11] It is contended in Guggino's brief that the court erred in denying numerous motions for severance made during the course of the trial pursuant to Rule 14, F.R.CrimP. Appellants argue in general terms that they were "prejudiced by evidence not admissible to them individually" and the "court's many cautionary instructions were inadequate" for the jury "to distinguish the alleged acts of one co-defendant from the other". We do not agree. The court was careful throughout the trial and in its charge to the jury to make it clear that the evidence should be considered separately as to each defendant. Appellants have failed to show "likelihood of prejudice" in the joint trial. The court did not abuse its discretion in denying their motions to sever. See *United States v. Crockett*, 514 F.2d 64, 70 (5 Cir. 1975).

[12] Trafficante argues that he should have been granted a severance to permit Guggino to give exculpatory testimony at a separate trial. Trafficante submitted, with his severance motion, an affidavit of Guggino in which Guggino asserted that he would testify at a separate trial of Trafficante but not at their joint trial. He averred that he would testify that Trafficante was not the party to whom he spoke in intercepted telephone conversations and that he would deny that several surveilled meetings with Trafficante were related to illegal gambling.

Both sides rely on *Byrd v. Wainwright*, 428 F.2d 1017 (5 Cir. 1970), which established guidelines for the granting of a severance where possible exculpatory evidence could be

presented by a co-defendant. As this court noted in *United States v. Cochran*, 499 F.2d 380, 392 (1974) *cert. denied*, 419 U.S. 1124, 95 S.Ct. 810, 42 L.Ed.2d 825 (1975), the "Byrd guidelines provided that (1) the testimony must be exculpatory in effect; (2) the testimony must be more than purely cumulative, or of negligible weight or probative value; and (3) there must be a likelihood that the co-defendant will be willing to testify if the defendant is tried separately."

Trafficante argues that all of these conditions were satisfied. In *Byrd*, however, the court also recognized that the trial judge may "make inquiry into the credibility or weight of the potential testimony of the codefendant" and "is not required to sever on patent fabrication". 428 F.2d at 1021.

In *United States v. Alejandro*, 527 F.2d 423, 428 (5 Cir. 1976) *cert. denied*, — U.S. —, 97 S.Ct. 124, 50 L.Ed.2d 115, it was recognized that the trial judge may also consider whether the testimony of the codefendant is "contrary to his own penal interest". There the codefendant had been "caught redhanded" and the court noted: "His effort to absolve his co-defendant cost him nothing. It is not unusual under such circumstances for the obviously guilty defendant to try to assume the entire guilt."

We have a comparable situation here. There was no real question of Guggino's guilt. He had nothing to lose by exculpating Trafficante and could perhaps be rewarded. The evidence which corroborated Ambler's identification of Trafficante's voice on the tapes also casts doubt on the credibility of Guggino's proffered testimony.

Under the circumstances the trial judge did not abuse his discretion in denying the motions for severance.

Ambler's Voice Identification Testimony

John Ambler was called by the Government to identify Trafficante's voice on certain tape recordings. In 1971 Ambler was a F.B.I. agent engaged in the investigation of the gambling operations. He had heard Trafficante's voice on some ten occasions. At the time of trial Ambler had retired from the F.B.I. and was employed by Trafficante's attorney as a private investigator. He was reluctant to testify, and as the judge found

in an *in camera* hearing, "would if he [could] tell as little and forget as much as possible". Called by the Government, Ambler testified to two occasions on which he identified Trafficante's voice. On cross-examination the defense elicited testimony that he was not positive of the identification. The court then declared Ambler a hostile witness and permitted the Government to elicit from Ambler that he had been retained by Trafficante's attorney as a private investigator. The Government also called three F.B.I. agents to testify to Ambler's positive identification of Trafficante's voice on November 1, 1971.

[13, 14] In contending that Ambler's testimony should not have been admitted, Trafficante argues, *inter alia*, that Ambler's testimony violated the attorney-client privilege, there was insufficient predicate for the testimony, and it was cumulative of other testimony. We find these contentions without merit. There was no evidence that Ambler had participated with Trafficante's attorney in the investigation or preparation of the case or had received any confidential information from the attorney, so that no violation of the attorney-client privilege is presented. Sufficient foundation was laid for Ambler's testimony when he stated he had heard Trafficante's voice some ten times. That other witnesses were available to provide identification is immaterial, particularly in view of the fact that Ambler was the agent most familiar with Trafficante's voice.

[15] Trafficante contends further that the court abused its discretion in treating Ambler as a hostile witness and permitting his impeachment based on his relationship with Trafficante's counsel. The common law rule prohibiting a party from impeaching his own witness "bears little present relationship to the realities of the criminal process". *Chambers v. Mississippi*, 410 U.S. 284, 296, 93 S.Ct. 1038, 1046, 35 L.Ed.2d 297 (1973).[12] In any event, in view of Ambler's reluctance to testify and evasiveness in his testimony, we conclude that the court did not err in declaring him a hostile witness and allowing impeachment through evidence of his present employment.

12. Rule 607, F.R.Evid., which became effective subsequent to the trial of this case, specifically provides that, "The credibility of a witness may be attacked by any party, including the party calling him."

[16] Finally, Trafficante contends that the court erred in allowing the three F.B.I. agents to testify with respect to Ambler's positive identification of Trafficante's voice on November 1, 1971. This evidence was properly admitted for impeachment purposes. A limiting instruction would have been proper had appellant requested it; but no request was made. The failure to give the instruction *sua sponte* was not reversible error. *United States v. Hill*, 481 F.2d 929, 932 (5 Cir. 1973), *cert. denied*, 414 U.S. 1115, 94 S.Ct. 847, 38 L.Ed.2d 742 (1974).

Jury Instructions

[17] Appellants first contend that the court erred in failing to instruct the jury that the defendants must be aware that the conspiracy must involve at least five participants. It is well settled, however, that the "five persons" criterion of § 1955 is a jurisdictional requirement unrelated to the criminal character of conduct. *United States v. Pacheco*, 489 F.2d 554, 558 (5 Cir. 1974); *United States v. Tucker*, 526 F.2d 279, 283-284 (5 Cir. 1976) *cert. denied*, — U.S. —, 97 S.Ct. 796, 50 L.Ed.2d 783 (1977). The argument here advanced by appellants was rejected by the Sixth Circuit in an exhaustive opinion in *United States v. Leon*, 534 F.2d 667, 675 (6 Cir. 1976). We conclude that the district court did not err in refusing to give the requested instruction.

[18] Nor is there merit in appellants' contention that the court erred in refusing to instruct the jury that the Florida gambling statutes do not apply to pari-mutuel wagering. There was no evidence suggesting that the gambling operation of appellants fell within the requested instruction. The instructions given were proper and adequate.

Evidentiary and Procedural Rulings

Disclosure of Confidential Informants

[19] Appellant Alfonso contends that the court erred in denying his motion for disclosure of the identity of four confidential informants. He relies primarily on *Roviaro v. United States*, 353 U.S. 53, 62, 77 S.Ct. 623, 628, 1 L.Ed.2d 639 (1957), where the Court held: "Where the disclosure of an informant's identity, or of the contents of his communications, is relevant to the defense of an accused, or is essential to a fair

determination of a cause, the privilege must give way." The Court continued:

> "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstance of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." 353 U.S. at 60, 61-62, 77 S.Ct. at 628. See also *McCray v. Illinois*, 386 U.S. 300, 310-312, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967).

Under the circumstances of this case, disclosure was not required. There is no evidence that the informants had participated in the activities for which Alfonso was charged or that evidence described by the informants was introduced at the trial. Nor is there any evidence that the informants implicated Alfonso. The district court did not err in denying Alfonso's motion for disclosure of the identity of the informants.

Agent Harker's Testimony

[20] Philip Harker, who was qualified as an expert in bookmaking and gambling, testified with respect to the meaning of gambling jargon contained in intercepted telephone conversations and the role of the appellants in the gambling operation. Appellants argue that this testimony wrongly invaded ultimate issues of fact to be determined by the jury. By reason or the cryptic nature of the recorded conversations, often framed in jargon peculiar to the gambling trade, it was appropriate to present expert testimony to supply meaning to the conversations and explain the roles of the appellants. See *United States v. Cirillo*, 499 F.2d 872, 881 (2 Cir. 1974), *cert. denied*, 419 U.S. 1056, 95 S.Ct. 638, 42 L.Ed.2d 653 (1974).

Aliases

[21] The second superseding indictment referred to appellants by their proper names, as well as by aliases used by appellants to identify each other in the taped telephone conversations. Appellants argue that the use of the aliases in the indictment invaded the jury's province of identification of the

voices on the tape. The aliases were extensively used in the intercepted conversations, and there was ample testimony to identify the appellants with the various aliases. Under these circumstances the court did not err in denying appellants' motion to strike the aliases. See *United States v. Skolek*, 474 F.2d 582, 586 (10 Cir. 1973); *United States v. Miranda*, 494 F.2d 783, 788 (5 Cir. 1974).

Rereading Evidence to Jury

[22-25] After beginning its dehiberations, the jury requested the court to replay the taped conversations of Trafficante and Figueredo. To prevent the jury from "ferreting out of context" certain evidence, the court ordered the tapes to be replayed for the jury together with the rereading, from the court reporter's notes, of testimony of witnesses relating to the matters discussed on the tapes. Appellants contend that they were prejudiced by the rereading of the evidence, both because of its excessive length[13] and because the evidence which was reread was slanted in favor of the Government.

It is well settled that a trial judge has broad discretion in responding to a jury request that certain evidence be reread. *Pinckney v. United States*, 352 F.2d 69 (5 Cir. 1965). As stated in the ABA Standards Relating to the Administration of Criminal Justice, Trial by Jury § 5.2(b) (1968):

> "The court need not submit evidence to the jury for review beyond that specifically requested by the jury, but in its discretion the court may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested."

The rereading procedure followed here evinces a concerted effort by the court to insure that the evidence requested by the jury was presented in a fair and complete manner and placed in its proper context.[14] The evidence reread was closely related to the material requested by the jury, and the manner of its

13. The rereading covered approximately one and one-half days of the trial.

14. As the court stated prior to the actual rereading of the evidence:

> "We will do it like they [the jury] heard it in the first place . . . I am not going to let it be done out of context, out of place, edited out or any other fashion.
>
> ". . . We will not distort the matter as it was presented to the Jury."

presentation indicated the court's complete impartiality. See *United States v. Gentile*, 525 F.2d 252, 260-261 (2 Cir. 1975), *cert. denied*, 425 U.S. 903, 96 S.Ct. 1493, 47 L.Ed.2d 753 (1976). The extreme length of the rereading proceedings does not indicate prejudice *per se;* nor do we find any evidence of prejudice in the record as recounted by appellants.

Neither do we find that the evidence reread unfairly favored the Government, as Trafficante contends. At the beginning of the rereading, the court stated that it would allow the rereading of a portion of the Government's case against Trafficante and "then move to the two defense witnesses who dealt with the voice identification of Henry Trafficante". At a later side bar conference, Trafficante's attorney advised the court that "out of the defense witnesses, the only part he wishe[d] to have done in connection with Mr. Trafficante [was] the short examination of Mr. Kinne" relating to a November 1, 1971, meeting. Thereafter, the court stated that while it would not reread Kinne's testimony, it would "play the two proffers which [went] strictly to the Ambler capability of identifying [Trafficante's] voice . . ." In view of this, appellants' arguments that the trial court skewed the reread evidence in favor of the Government is not well taken. We find that the court properly exercised its discretion in rereading certain evidence to the jury.[15]

Record of Rereading

[26-28] Appellants also contend that the court erred in failing to make a record of the rereading. 28 U.S.C. § 753(b)(1) requires that a court reporter attend each session of district court and record "all proceedings in criminal cases had in open court". Upon a review of the record we find that the court carefully explained to the jury the procedure to be followed in response to its request for the Trafficante tape. A record was made of numerous objections and motions of counsel outside the presence of the jury, colloquy between court and counsel, and the rulings of the court.

15. Appellants also contend that the court erred in refusing to allow them to make additional summations to the jury after the evidence had been reread. The court properly followed the format for final arguments set out in Rule 29.1, F.R.Crim.P. Appellants were not entitled to additional summations.

Appellants contend, however, in a "Supplemental Affidavit" and supporting argument filed subsequent to oral argument, that the district court erroneously failed to make a record of the rereading of the evidence, objections, comments of counsel, and court rulings made in open court in the course of the rereading. Specifically the affidavit states that appellants offered a daily copy of the testimony prepared by a state court reporter; that the court sustained the Government's objection to the use of that transcript, and held that only the notes of the official court reporter be read; that there were discrepancies between the notes of the two reporters, and objections were made by counsel for appellants and overruled by the court. While these proceedings are not shown in the transcript of the record, appellants have failed to show they were prejudiced by their omission.[16] In any event, the district court properly relied on the notes of the official court reporter.

It is true, as appellants contend, that the cases are uniform in holding that the requirements of 28 U.S.C. § 753(b) are "mandatory, not permissive". See, *e. g., Calhoun v. United States*, 384 F.2d 180, 183 (5 Cir. 1967). The cases also agree, however, that failure to comply with the statute does not constitute prejudicial error per se. See, *e. g., Strauss v. United States*, 311 F.2d 926 (5 Cir. 1963), *cert. denied*, 373 U.S. 910, 83 S.Ct. 1299, 10 L.Ed.2d 412 (1963). Rather, as this court stated in *United States v. Long*, 419 F.2d 91, 94 (1969): ". . . in order to require reversal, some specific error or prejudice resulting from failure to record such proceedings must be called to the Court's attention". The rationale behind this requirement was stated by this court in *Addison v. United States*, 317 F.2d 808, 811 (1963): "Obviously even though a failure of the court reporter to report the arguments of counsel were an error per se, such error would not be available to appellants to work a reversal without a showing that it was prejudicial error. Rule 52(a) F.R.Crim. Proc."

Nowhere, either in their briefs or in their Supplementary Affidavit, do appellants specify any prejudice arising from the court's failure to require all of the court proceedings to be recorded. 'This fact alone destroys appellants[']' position,

16. The same is true of the allegations in the supplemental affidavit and argument with respect to the omission of other objections and comments of counsel during the rereading of the testimony.

Addison v. United States, supra at 811, and distinguishes the present case from those in which this Court has reversed convictions for failure to record proceedings." *United States v. Long, supra* at 94.[17]

Nor do we find any merit in the contention of appellant Vega that the reinstruction of the jury following the rereading of the evidence was confusing or improper.[18]

Sufficiency of Evidence

Gross Revenue

[29] Appellants argue that the Government failed to show that their gambling operations had a gross revenue of $2,000 in any single day. F.B.I. Agent Harker, however, testified that based upon the intercepted conversations, he calculated that the daily receipts of the enterprise on October 2, 9, and 10, 1971 were $15,569.00, $2,225.00 and $12,897.00 respectively. This testimony was sufficient to establish the statutory element of "gross revenue". See *United States v. Sacco*, 491 F.2d 995, 1001 (9 Cir. 1974) (en bane).

Trafficante

Trafficante attacks the sufficiency of the evidence upon the supposition that the recorded interception of his conversations was inadmissible. We have held, *supra*, that these recordings were properly admitted and that F.B.I. Agent Ambler's identification of Trafficante's voice was sufficient. Other evidence corroborated this identification. In particular, Trafficante and Guggino were observed meeting following a recorded telephone conversation in which the caller and Guggino agreed to meet at that time and place. The evidence as a whole was sufficient to sustain Trafficante's conviction.

17. *United States v. Selva*, 546 F.2d 1173 (5 Cir. 1977), cited in appellants' supplemental argument, is distinguishable. There no record was made of counsel's argument, and the case was remanded for a hearing "for the purpose of supplementing the record, if possible to disclose what transpired during the closing arguments at the trial". We find no basis in the affidavit and argument of appellants' counsel to require this procedure.

18. The court instructd the jury, *inter alia*, that "Count I of the indictment further alleges that the defendants would use *these means* to carry out their conspiracy". (Emphasis added.) The court then specified the allegations with respect to the participation of each of the appellants without repeating the reference to Count I. The use of the phrase "these means" manifestly refers to the allegations thereafter set forth with respect to the various defendants.

Figueredo

[30, 31] Figueredo contends that his gambling operation was separate from that of Trafficante, precluding prosecution under 18 U.S.C. § 1955, which requires participation by five or more persons. The proof, however, established a nexus between the gambling operations of Trafficante and Figueredo. The evidence showed that Figueredo regularly accepted lay-off bets from the Trafficante operation. As this court held in *United States v. Joseph*, 519 F.2d 1068, 1071 (1975), it was the intent of Congress in enacting § 1955 to include all persons who participate in the operation of a gambling business, including lay-off bettors, and to exclude only customers of the business.

Conclusion

We find no reversible error and affirm the convictions of all of the defendants.

~~UNITED STATES OF AMERICA,~~
Plaintiff-Appellee,
v.
EDWARD GRADY PARTIN,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
HAROLD SYKES,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
O. ROMAINE RUSSELL,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
DON MARIONNEAUX and HUGH MARIONNEAUX,
Defendants-Appellants.

~~Nos. 75-3615, 75-3792, 75-4010 and 75-4155.~~

United States Court of Appeals,
Fifth Circuit.

May 19, 1977.

On remand from the Court of Appeals, 493 F.2d 750 and 514 F.2d 1244, defendants were convicted in the United States District Court for the Western District of Louisiana at Shreveport, Nauman S. Scott, Chief Judge, of conspiring to obstruct the due administration of justice and they appealed. The Court of Appeals, Lewis R. Morgan, Circuit Judge, held that: (1) it was error in one trial to instruct the jury that only slight evidence was required to connect a particular defendant with the conspiracy; (2) grand jury which issued the indictment had jurisdiction to investigate suspected witness trampering; (3) evidence of activities of one defendant prior to the commencement of the conspiracy was properly admitted; (4) trial court did not err in refusing to hold hearing to determine competency of defendant to testify despite evidence that his diabetic condition was not completely under control; (5) trial court did not err in refusing to recuse itself; (6) change of venue was properly denied; (7) severance was properly denied; (8) instruction on requirement that the attempt to impede the due administration of justice be corrupt was sufficient; and (9) instruction on the witness security program was proper.

Reversed in part and affirmed in part.

1. Conspiracy —48.2(1)
Criminal Law —1172.2

Instruction that, once the existence of the agreement or common scheme of conspiracy is shown, slight evidence is all that is required to connect a particular defendant with the conspiracy conflicts with the proposition that every act of guilt must be established beyond a reasonable doubt; giving of the instruction is reversible error.

2. Grand Jury —26

Where indictment being considered by grand jury was brought in the Eastern District of Louisiana and the events involved were centered there, and where one witness who had been subpoensed by the Government had been out of sight for a long time so that district attorney could only make an educated

guess as to where and by whom, if anyone, the witness had been put in fear of his life, grand jury in the Eastern District of Louisiana had authority to investigate possible witness tampering in connection with the underlying indictment even though, in bindsight, it was shown that no obstruction of justice had yet occurred. 18 U.S.C.A. § 1503.

3. Grand Jury —36

Even if grand jury had been proceeding without jurisdiction, proper method for witness to contest its jurisdiction to issue subpoena was to file motion to quash, not to ignore the subpoena.

4. Conspiracy —34

Defendant could be convicted of conspiring to obstruct the due administration of justice by conspiring to induce another to commit perjury. 18 U.S.C.A. § 1503.

5. Witnesses —297(9)

Witness may not claim the privilege against self-incrimination out of the fear that he will be prosecuted for perjury for what he is about to say; witness may claim that privilege if his new testimony might suggest that he has perjured himself in testifying on the same subject in a prior proceeding. U.S.C.A.Const. Amend. 5.

6. Criminal Law —1130(2)

Failure of counsel to give citations to portions of the record from which it quotes is unacceptable and may have dire consequences for the party, especially where the case involves a consolidated appeal with 50 volumes of record and a number more of supplementary record. Fed.Rules App. Proc., rule 28(e), 28 U.S.C.A.

7. Criminal Law —661

In defendant's trial for conspiracy to obstruct justice, in which parties had prepared a stipulation, which covered events through October 3, 1972, in order to permit the jury to understand the background of the case, evidence of activities between October 3 and November 9, the date on which the conspiracy was alleged to have started, was properly admitted to bridge the gap in time between that covered by the stipulation and that covered by the indictment so that jury

would not become confused and have to speculate about the period. 18 U.S.C.A. § 1503.

8. Criminal Law —625

Letter in which physician stated that defendant's subjective story given to the physician was that he had had a near collapse in the courtroom with a deviation from rationality in speech and manner as result of diabetes problem was insufficient to require trial court to hold a hearing to determine whether the defendant had been competent at the time that he testified where the self-serving account contained in the letter was directly at odds with the district court's first hand observation. 18 U.S.C.A. § 4244.

9. Judges — 47(2)

Fact that judge who presided at defendant's retrial following remand had pre-

The Petitioner, Henry Trafficante, adopts the Appendix of the Petition for Writ of Certiorari filed by co-defendants, Alfredo Fernandez "Chino" "Al" Alfonso, Steve Guggino, Frank Fraterrigo Vega, Louis Henry "Dr.", "Bacardi" Figueredo, Sr., Sam Vaglica and Sam Castellano, Jr.